Supreme Court, U. S.
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IN THE

Supreme Court of the United States

NO. 77-1213

OCTOBER TERM, 1978

RAUL LLORENTE and ALVARO DORONZORO,
Petitioners,

v.

PEOPLE OF THE STATE OF NEW YORK,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT AND TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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APPELLANTS' REPLY BRIEF

STATEMENT

This reply brief is submitted in support of the petition for a writ of certiorari.

POINT I

THE RESPONDENT CONFIRMS ITS VIOLATION OF THE PLEA BARGAIN AGREEMENTS WITH PETITIONERS AND ITS POSITION THAT IT WOULD KEEP THE PLEA BARGAIN AGREEMENT ONLY IF THE PETITIONERS' APPEALS WERE UNSUCCESSFUL, BUT NOT OTHERWISE.

The respondent has not denied the petitioners' charges that after it recognized that the petitioners would succeed on their appeals (Pet. 11), it demanded in its brief and orally argued on appeal to the Appellate Division that the respective indictments be ordered reinstated for the purpose of further prosecuting the petitioners on the same indictments, notwithstanding the plea bargain agreements that there would be no further prosecution of the indictments (Pet. 11-13).

The respondent's demand to the Appellate Division to reinstate the "remaining counts" of the indictment, made in its brief and in its oral argument to that court, violated the plea bargain agreement (Pet. 9-11).

The respondent concedes that under New York Criminal Procedure Law Section 710.70(2) after their conviction upon their pleas of guilty and their sentence the petitioners had the statutory right to appeal the orders denying their pre-trial motions to suppress the evidence upon

which the count to which they entered their guilty pleas, was based (Resp. 5), to wit:

> "An order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction *notwithstanding the fact that such judgment is entered upon a plea of guilty.*" NYCPL 710.70(2).*

The respondent confirmed in its brief at pp. 5 and 8 that under the *joint* plea bargain agreement made by the three defendants and the prosecution and approved by the Court, each petitioner's guilty plea to the one count of the respective indictment, covered, embraced, and satisfied the whole indictment with prejudice and constituted "dispositions of the entire indictments" (Resp. 5, 8), (Pet. 10).

The respondent also confirmed that it was part of the plea bargain agreements that the respondent "wavied his right to proceed" to further prosecute the indictment and that the plea bargain agreement was a "bar to the prosecution of these other charges" (Resp. 10).

The respondent argued, however, that when the petitioners were *successful* on their appeal, that by reason of their *successful* appeal, "the plea agreement did not remain in effect" (Resp. 10), that it was "set aside" (Resp. 10), and that it left "the State . . . free to prosecute" (Resp. 10).

The argument of the respondent in this Court is that an *unsuccessful* appeal does not affect and does not "set aside" the plea bargain agreement, but that a *successful* appeal does (Resp. 10).

The respondent's argument comes to this: the prosecutor will honor and keep a plea bargain agreement, only when, and if, the plea bargain defendant gives up his statutory, and constitutionally protected, right to appeal (Resp. 6-12). That is the actual position of the respondent,

however it is phrased. What good is the right to appeal to a defendant if he is not allowed to take any benefit from that procedure, which the statute NYCPL 710.70(2) grants to him? The right to appeal must have no value to the petitioner, in so far as respondent is concerned, otherwise, if petitioner exercises his right to appeal and is successful, the respondent will not honor and will not keep the plea bargain agreement. (Pet. 12-13).

In this case, when the prosecutor recognized that the petitioners would succeed on their appeal, the prosecutor violated the plea bargain agreement and demanded that the Appellate Division reinstate the indictment for further prosecution of the petitioners (Pet. 11), which the Appellate Division thereafter directed (Pet. 9a-10a, 2a, 4a).

POINT II

THE PROVISIONS OF THE ORDER OF THE APPELLATE DIVISION DIRECTING THAT EACH PETITIONER'S PLEA BE VACATED AND REINSTATING THE INDICTMENT AFTER REVERSING THE JUDGMENT OF CONVICTION AND DISMISSING THE COUNT ON APPEAL WAS ILLEGAL, UNAUTHORIZED, AND INVALID, AND VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS.

A. The Appellate Division had no power to vacate petitioners' guilty pleas and to reinstate their indictments for further prosecution under either NYCPL 470.55(2), or NYCPL 440.10(7).

The respondent alleged in its brief at page 8 that "New York Criminal Procedure Law Section 470.55 makes clear that upon appellate reversal of a guilty plea (sic) the other counts of an indictment are reinstated." (Matter in parenthesis added). It also alleged at page 7 of

its brief that "There can be no doubt, however, that the Appellate Division had the power to order the reinstatement of those counts, a procedure specifically mandated by New York Criminal Procedure Law Section 470.55."

The Appellate Division did not have that view of New York Criminal Procedure Law Section 470.55 since the appellate court neither cited nor referred to NYCPL 470.55 as the statutory authority for its decision that "the count to which they pleaded, being count 5 in the Llorente indictment, and count 20 in the Doronzoro indictment, should be *dismissed,* and the accusatory instruments should be restored to the prepleading status with all the counts contained therein at the time of the plea, except those ordered dismissed. CPL 440.10(7)." (Pet. 9a-10a) (Emphasis Added).

That decision was followed by its order directing that the "judgment so appealed from be and the same hereby is *reversed on the law, the plea vacated, defendant's motion to suppress granted as to drugs found in Apartment 2F, Count . . . dismissed, the indictment otherwise reinstated,* and the matter remanded for further proceeding" (Pet. 2a, 4a) (Emphasis added). Since the Appellate Division did not justify its decision and order upon NYCPL 470.55, it is inappropriate for the respondent to attempt to rewrite that appellate court's decision and order to do so. It is inappropriate also for the respondent to attempt to change the ground of the Appellate Division's decision and order and to argue another ground for the decision before this Court upon the principle of estoppel. See, *Railroad v. McCarthy,* 96U.S. 258, 266-267 (1877); *People v. Roper,* 259 N.Y. 170 (1932); *People v. Sweet,* 130 Misc. 612 (1927).

NYCPL 470.55 does not empower the Appellate Division to order the vacatur of petitioners' pleas, and the restoration of the indictments to prepleading status after the appellate court reversed the judgments, granted the

motions to suppress the evidence and dismissed the counts on appeal, and thus acquitted the petitioners (Point III, infra).

NYCPL 470.55 is merely *descriptive* of the status of the accusatory instrument following a determination by an appellate court, acting pursuant to the power and authority granted to it by NYCPL 470.15 and NYCPL 470.20 to determine an appeal before it. NYCPL 470.15 grants to an appellate court the power to determine an appeal in three ways: to "affirm or reverse or modify the criminal count judgment, sentence or order." NYCPL 470.15(2). NYCPL 470.20, entitled "Determination of appeals by intermediate appellate courts; corrective action upon *reversal* or modification," grants the power to the appellate court to order "corrective action," as defined in NYCPL 470.10(3).

NYCPL 470.10(3) defines "corrective action" as meaning "affirmative action taken or directed by an appellate court upon *reversing* or modifying a judgment, sentence or order of another court, *which disposes of or continues the case in a manner consonant with the determination and principles underlying the reversal or modification.*" (Emphasis added).

The Appellate Division, in the cases at bar, *reversed* each petitioner's judgment of conviction, granted their motion to suppress the evidence, and *dismissed* the count on appeal, which count, under the plea bargain agreement, embraced and covered the indictment with prejudice against further prosecution of the indictment (Pet. 9-11). The *dismissal* was *corrective action* under NYCPL 470.20(2). *That corrective action was "consonant with the determination and principles underlying the reversal"* as set forth in NYCPL 470.10(3), which defined "corrective action." The *reason* for the reversal, as set forth in the decision of the Appellate Division was that the search and

seizure was illegal, that the petitioners had standing to move to suppress and that the lower court was in error in failing to grant the petitioners' motions to suppress the evidence (Pet. 8a-10a). The reason for the dismissal was that without the evidence, which was ordered suppressed, by the Appellate Division, there was no evidence to prove the indictments under the counts on appeal. NYCPL 470.20(2). The "corrective action" of dismissal was therefor "consonant with the determinations and principles underlying the reversal. NYCPL 470.20(2) provides that "Upon reversal of a judgment after trial for *legal insufficiency* of trial evidence, the court must dismiss the accusatory instrument" (Emphasis added). That dismissal was an acquittal of the petitioners. Point III, infra.

The Appellate Division had no authority to order that the petitioners' pleas be withdrawn and to reinstate the indictment. (Pet. 2a, 4a). NYCPL Section 470.55(2) describes the status of an indictment in the case of an "Appellate court order which reverses a judgment based upon a plea of guilty to an accusatory instrument or part thereof, *but which does not dismiss the entire accusatory instrument . . .*" In such a case, NYCPL 470.55(2) provides *automatically,* "in the absence of express appellate court direction to the contrary . . . the criminal action it . . . restored to its pre-pleading status and the accusatory instrument is deemed to contain all of the offenses which it contained and charged *at the time of the entry of the plea,* except those dismissed upon appeal or upon some other post-judgment order" (Emphasis added).

In the cases at bar, there was only one count to the indictment on appeal which embraced and covered the entire indictment, and the dismissal of that one count *was a dismissal of the indictment.* (See Point III, infra).

The provisions of NYCPL 470.55(2) confirm this construction since the *only* count in the indictment "at the

time of the entry of the plea" (NYCPL 220.50(4); NYCPL 1.20(10), 1.20(13)), was only the one count on appeal.

As set forth in Point II, infra, no New York court, on its own motion, has the power *to vacate* a defendant's plea under NYCPL 440.10(7). In the event of a reversal of a judgment based upon a guilty plea, an appellate court may nullify the proceedings by reversing the judgment and remanding the action for a new trial "of such offense." NYCPL 40.30(3). The slate there, is wiped clean. However, where the appellate court vacates the judgment by reversal, but orders a *dismissal,* rather than a new trial of the same offense, the judgment to which is reversed, NYCPL 40.30(3), the result is an *acquittal,* and the indictment terminates (Point III, infra).

B. The Appellate Division decision and order at issue is not authorized by NYCPL 440.10(7).

The assertion by the respondent that the decision and order of the Appellate Division (Pet. 10a, 2a, 4a) are authorized by NYCPL 470.55, rather than NYCPL 440.10(7), which was the statute cited and relied on by the Appellate Division, demonstrates that the respondent concedes that NYCPL 440.10(7) does *not* authorize the Appellate Division to make that decision and order, (Resp. 5, 7), and constitutes an abandonment by the respondent of any reliance upon NYCPL 400.10(7) as authority for the said decision and order of the Appellate Division.

NYCPL 440.10 entitled *"Motion* to vacate judgment," shows on its face at subdivision (1) that it can only be put into operation "upon motion *of the defendant,"* by the defendant *only,* and not by either the court, or a prosecutor, *Matter of Fernandez v. Silbowitz,* — A.D. 2d —, 398 N.Y.S.2d 896 (1st Dept. 1977); *People v. Damsky,* 47A.D.2d 822, 366 N.Y.S. 2d 13 (1st Dept. 1975); *Sekaloff v. Hogan,* 41 A.D. 2d 815, 342 N.Y.S. 2d

417 (1st Dept. 1973); *People v. Murphy,* 53 A.D. 2d 530, 384 N.Y.S. 2d 180 (1st Dept. 1976); *People v. Griffith,* 43 A.D.2d 349 N.Y.S. 2d 94 (1st Dept. 1973), and only *in the court in which the plea was entered, People v. Crimmins,* 38 N.Y.2d 407, 417, note 1, 381 N.Y.S.2d 1, 9 (1975); *People v. Wurzler,* 300 N.Y. 344 (1950); *People v. Hatzis,* 297 N.Y. 163 (1948); *People v. Wilson,* 18 A.D. 2d 424, 293 N.Y.S. 2d 900, affirmed 13 N.Y.2d 277, app. dismissed, 377 U.S. 925 (1963); *People v. Rivera,* 37 A.D. 2d 799, 324 N.Y.S.2d 731 (1st Dept. 1971). NYCPL 440.10(7) is part of and is controlled by NYCPL 440.10(1). NYCPL 440.10(7) is not a free standing provision.

POINT III

THE REVERSAL OF THE JUDGMENT AS TO EACH PETITIONER AND THE DISMISSAL OF THE ONLY COUNT ON APPEAL UNDER EACH PETITIONER'S INDICTMENT WAS AN ACQUITTAL OF EACH PETITIONER OF THAT INDICTMENT AND BARRED FURTHER PROSECUTION OF THE INDICTMENTS.

Upon the plea bargain agremeent the guilty plea by each petitioenr to the one count on appeal of this indictment, covered, embraced, and satisfied the entire indictment with prejudice against further prosecution (Pet. 10-11, 7).

The Appellate Division did not "wipe the slate clean", (See, NYCPL 40.30), but rather reversed the judgment, and dismissed the only count on appeal as to each petitioner (Pet. 10a, 2a, 4a; Resp. 2, 5). The *dismissal* was ordered as a matter of law after the appellate court ordered that the petitioners' respective motions to suppress evidence be granted (Pet. 9a-10a). The dismissal was

directed, on the ground of legal insufficiency of the evidence to prove the count on appeal and "deprived the plea of the essential underlying elements of guilt" (Pet. 9a). NYCPL 470.20(2); *People v. Marra,* 13 N.Y. 2d 18, 21-22, 241 N.Y.S. 2d 409, 412 (1963); *Matter of Kraemer v. County Court of Suffolk County,* 6 N.Y.2d 363, 367, 189 N.Y.S.2d 878, 881 (1959); *People v. Farone,* 308 N.Y.302 (1955).

The respondent has not challenged the dismissal. Indeed, the respondent conceded that the search was illegal, and thus that the dismissal was proper (Pet. 9a) (Resp. 5). The dismissal by the Appellate Division was an *acquittal* of each petitioner respectively as to each indictment, *People v. Weiner,* 211 N.Y. 469, 475 (1914); *People v. Volpe,* 20 N.Y. 2d 9, 13, 281 N.Y.S. 2d 295, 298 (1967); *People v. Patterson,* 21 A.D. 2d 356, 250 N.Y.S. 2d 715, 717, 721-722 (1st Dept. 1964); *People v. Eckerson,* 133 App. Div. 220, 117 N.Y.S. 418, 423-424 (2d Dept. 1909), and barred further prosecution of the indictment. *Green v. United States,* 355 U.S. 184 (1957).

CONCLUSION

THE DEMANDS TO THE APPELLATE DIVISION BY THE PROSECUTOR TO REINSTATE THE INDICTMENTS AGAINST PETITIONERS, IN VIOLATION OF THE PLEA BARGAIN AGREEMENT, VIOLATED PETITIONERS' CONSTITUTIONAL RIGHTS.

After the prosecutor received the petitioners' appellate court briefs and recognized that petitioners would succeed on their appeal, the prosecutor made demands to the Appellate Division in its brief and on oral argument to reinstate the indictments for further prosecution of the petitioners in violation of the plea bargain agreement that there would be no further prosecution of the indictments and violated petitioners' constitutional rights (Pet. 8-15).

Respectfully submitted,

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APPENDIX

NEW YORK STATUTES CRIMINAL PROCEDURE LAW

§1.20 Definitions of terms of general use in this chapter.

Except where different meanings are expressly specified in subsequent provisions of this chapter, the term definitions contained in section 10.00 of the penal law are applicable to this chapter, and, in addition, the following terms have the following meanings:

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10. "Plea," in addition to its ordinary meaning as prescribed in sections 220.10 and 340.20, means, where appropriate, the occasion upon which a defendant enters such a plea to an accusatory instrument.

***

13. "Conviction" means the entry of a plea of guilty to, or a verdict of guilty upon, an accusatory instrument other than a felony complaint, or to one or more counts of such instrument.

14. "Sentence" means the imposition and entry of sentence upon a conviction.

15. "Judgment." A judgment is comprised of a conviction and the sentence imposed thereon and is completed by imposition and entry of the sentence.

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§220.50 Plea; entry of plea.

1. A plea to an indictment, other than one against a corporation, must be entered orally by the defendant in person; except that a plea to an indictment which does not charge a felony may, with the permission of the court, be entered by counsel upon submission by him of written

authorization of the defendant.

2. A plea to an indictment against a corporation must be entered by counsel.

3. If a defendant who is required to enter a plea to an indictment refuses to do so or remains mute, the court must enter a plea of not guilty to the indictment in his behalf.

4. Where the permission of the court and the consent of the people are a prerequisite to the entry of a plea of guilty, the court and the prosecutor must either orally on the record or in a writing filed with the indictment state their reason for granting permission or consenting, as the case may be, to entry of the plea of guilty.

§440.10 Motion to vacate judgment.

1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:

. . .

7. Upon an order which vacates a judgment based upon a plea of guilty to an accusatory instrument or a part thereof, but which does not dismiss the entire accusatory instrument, the criminal action is, in the absence of an express direction to the contrary, restored to its prepleading status and the accusatory instrument is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time of the entry of the plea, except those subsequently dismissed under circumstances specified in paragraphs (b) and (c) of subdivision six. . . ."

§470.10 Determination of appeals; definitions of terms.

The following definitions are applicable to this article:

1. "Reversal" by an appellate court of a judgment,

sentence or order of another court means the vacating of such judgment, sentence or order.

2. "Modification" by an appellate court of a judgment or order of another court means the vacating of a part thereof and affirmance of the remainder.

3. "Corrective action" means affirmative action taken or directed by an appellate court upon reversing or modifying a judgment, sentence or order of another court, which disposes of or continues the case in a manner consonant with the determinations and principles underlying the reversal or modification.

§470.15 Determination of appeals by intermediate appellate courts; scope of review.

1. Upon an appeal to an intermediate appellate court from a judgment, sentence or order of a criminal court, such intermediate appellate court may consider and determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant.

2. Upon such an appeal, the intermediate appellate court ;must either affirm or reverse or modify the criminal court judgment, sentence or order. The ways in which it may modify a judgment include, but are not limited to, the following:

(a) Upon a determination that the trial evidence adduced in support of a verdict is not legally sufficient to establish the defendant's guilt of an offense of which he was convicted but is legally sufficient to establish his guilt of a lesser included offense, the court may modify the judgment by changing it to one of conviction for the lesser offense;

(b) Upon a determination that the trial evidence is not legally sufficient to establish the defendant's guilt of all the offenses of which he was convicted but is legally suffi-

cient to establish his guilt of one or more of such offenses, the court may modify the judgment by reversing it with respect to the unsupported counts and otherwise affirming it;

(c) Upon a determination that a sentence imposed upon a valid conviction is illegal or unduly harsh or severe, the court may modify the judgment by reversing it with respect to the sentence and by otherwise affirming it.

3. A reversal or a modification of a judgment, sentence or order must be based upon a determination made:

(a) Upon the law; or

(b) Upon the facts; or

(c) As a matter of discretion in the interest of justice; or

(d) Upon any two or all three of the bases specified in paragraphs (a), (b) and (c).

4. The kinds of determinations of reversal or modification deemed to be upon the law include, but are not limited to, the following:

(a) That a ruling or instruction of the court, duly protested by the defendant, as prescribed in subdivision two of section 470.05, at a trial resulting in a judgment, deprived the defendant of a fair trial;

(b) That evidence adduced at a trial resulting in a judgment was not legally sufficient to establish the defendant's guilt of an offense of which he was convicted;

(c) That a sentence was unauthorized, illegally imposed or otherwise invalid as a matter of law.

5. The kinds of determinations of reversal or modification deemed to be on the facts include, but are not limited to, a determination that a verdict of conviction resulting in a judgment was, in whole or in part, against the weight of the evidence.

6. The kinds of determinations of reversal or modification deemed to be made as a matter of discretion

in the interest of justice include but are not limited to, the following:

(a) That an error or defect occurring at a trial resulting in a judgment, which error or defect was not duly protested at trial as prescribed in subdivision two of section 470.05 so as to present a question of law, deprived the defendant of a fair trial;

(b) That a sentence, though legal, was unduly harsh or severe.

§470.20 Determination of appeals by intermediate appellate courts; corrective action upon reversal or modification.

Upon reversing or modifying a judgment, sentence or order of a criminal court, an intermediate appellate court must take or direct such corrective action as is necessary and appropriate both to rectify any injustice to the appellant resulting from the error or defect which is the subject of the reversal or modification and to protect the rights of the respondent. The particular corrective action to be taken or directed is governed in part by the following rules:

1. Upon a reversal of a judgment after trial for error or defect which resulted in prejudice to the defendant or deprived him of a fair trial, the court must, whether such reversal be on the law or as a matter of discretion in the interest of justice, order a new trial of the accusatory instrument and remit the case to the criminal court for such action.

2. Upon a reversal of a judgment after trial for legal insufficiency of trial evidence, the court must dismiss the accusatory instrument.

3. Upon a modification of a judgment after trial for legal insufficiency of trial evidence with respect to one or more but not all of the offenses of which the defenant was

convicted, the court must dismiss the count or counts of the accusatory instrument determined to be legally unsupported and must otherwise affirm the judgment. In such case, it must either reduce the total sentence to that imposed by the criminal court upon the counts with respect to which the judgment is affirmed or remit the case to the criminal court for re-sentence upon such counts; provided that nothing contained in this paragraph precludes further sentence reduction in the exercise of the appellate court's discretion pursuant to subdivision six.

4. Upon a modification of a judgment after trial which reduces a conviction of a crime to one for a lesser included offense, the court must remit the case to the criminal court with a direction that the latter sentence the defendant accordingly.

5. Upon a reversal or modification of a judgment after trial upon the ground that the verdict, either in its entirety or with respect to a particular count or counts, is against the wegith of the trial evidence, the court must dismiss the accusatory instrument or any reversed count.

6. Upon modifying a judgment or reversing a sentence as a matter of discretion in the interest of justice upon the ground that the sentence is unduly harsh or severe, the court must itself impose some legally authorized lesser sentence.

§470.55 Status of accusatory instrument upon order of new trial or restoration of action to pre-pleading status.

1. Upon a new trial of an accusatory instrument resulting from an appellate court order reversing a judgment and ordering such new trial, such accusatory instrument is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time the previous trial was commenced, regardless of whether any count was dismissed by the court in the course of such

trial, except (a) those upon or of which the defenant was acquitted or deemed to have been acquitted, and (b) those dismissed upon appeal or upon some other post-judgment order.

2. Upon an appellate court order which reverses a judgment based upon a plea of guilty to an accusatory instrument or a part thereof, but which does not dismiss the entire accusatory instrument, the criminal action is, in the absence of express appellate court direction to the contrary, restored to its pre-pleading status and the accusatory instrument is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time of the entry of the plea, except those dismissed upon appeal or upon some other post-judgment order. Where the plea of guilty was entered and accepted, pursuant to subdivision three of section 220.30, upon the condition that it constituted a complete disposition and dismissal not only of the accusatory instrument underlying the judgment reversed but also of one or more other accusatory instruments against the defendant then pending in the same court, the appellate court order of reversal completely restores such other accusatory instruments; and such is the case even where the order of reversal dismissed the entire accusatory instrument underlying the judgment reversed.

§710.70 Motion to suppress evidence; orders of suppression; effects of orders and of failure to make motion.

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2. An order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty.